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In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM HARPER, M.D., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a medical officer who participates in the Armed Forces Health Professions Scholarship Program (AFHPSP) is eligible to receive Variable Incentive Pay (VIP) at the completion of his internship and residency.

2. Whether, if an AFHPSP participant is ineligible for VIP upon completion of his internship and residency, the statutory classification violates the Due Process Clause of the Fifth Amendment.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is not reported. The oral ruling of the district court is set forth at Pet. App. 7a-8a.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on May 20, 1980. A petition for rehearing was denied on June 18, 1980 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on September 15, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners are physicians in the United States Armed Forces whose medical education was paid for, in whole or in part, by the United States under the Armed Forces Health Professions Scholarship Program (AFHPSP). 10 U.S.C. 2120 *et seq.* By their acceptance of this subsidized medical education, petitioners incurred an active duty service obligation, the length of which was to be determined under regulations prescribed by the Secretary of Defense. 10 U.S.C. 2123(a).[1] 10 U.S.C. 2123(b) specifically provides that

> [a] period of time spent in military intern or residency training shall not be creditable in satisfying an active duty obligation imposed by [10 U.S.C. 2123].

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[1] Department of Defense Directive 1215.4, the regulation implementing the AFHPSP statute, provides that the active duty obligation for AFHPSP participants is a year for year payback with a two year minimum.

Upon completion of their residencies, petitioners sought a Variable Incentive Pay bonus (VIP) under 37 U.S.C. 313. This statute was enacted in order to "increase the pay differential provided to medical * * * officers in the uniformed services in an attempt to meet the severe problems facing those services in attracting health professionals in an all volunteer environment." H.R. Rep. No. 93-883, 93d Cong., 2d Sess. 6 (1974). Section 313 provides that under regulations prescribed by the Secretary of Defense or Health and Human Services, a qualifying medical officer may receive, in addition to any other pay or allowances to which he is entitled, up to $13,500 of bonus pay for each year of an active duty agreement. In order to qualify for VIP, a medical officer, among other requirements, must not be serving "an initial active duty obligation of four years or less" or "the first four years of an initial active duty obligation of more than four years." 37 U.S.C. 313(a)(4). Because petitioners were members of a program in which the time spent in intern or residency training was not creditable toward satisfying an active duty obligation, and because, without credit for their time in intern and residency training, petitioners had not served their initial active duty obligation, they were denied VIP.

Petitioners brought this action in the United States District Court for the District of Columbia to challenge the denial of bonus pay. The government moved to dismiss the complaint for failure to state a claim upon which relief could be granted, on the ground that the denial of VIP was clearly supported by statute and regulation. The district court granted the motion (Pet. App. 5a), and the court of appeals affirmed (Pet. App. 1a-2a).

ARGUMENT

Petitioners contend that their prior internship and residency training constituted four years of active duty service, thus rendering them eligible for VIP. This issue is not of sufficient continuing importance to warrant review by this Court. Pub. L. No. 96-107, 93 Stat. 812, effective Oct. 1, 1979, eliminated from the VIP statute the requirement that a medical officer not be serving an initial active duty obligation of four years or less or the first four years of an initial active duty obligation of more than four years (Section 804(b)(1)), and added a provision that a medical officer serving an active duty obligation resulting from a medical education program would receive $9,000 (rather than an amount up to $13,500) for each year of the active duty agreement (Section 804(b)(2)). Although this amendment is prospective only and thus has no effect on petitioners' claims, its enactment decreases substantially the need for this Court's intervention. In any event, the decision below is correct and does not conflict with any decision of this Court or any other court.

1. Petitioners claim that under 37 U.S.C. 313 they are entitled to VIP after four years of internship and residency. This contention is belied by the plain language of the VIP statute.

a. Under the VIP program, a medical officer in the Armed Forces who meets various requirements and who executes a written agreement under which he agrees to complete a specified number of years of continuous active duty may receive bonus pay in an amount up to $13,500 for each year of the active duty agreement. 37 U.S.C. 313(a). For purposes of the present case, the controlling requirement

(37 U.S.C. 313(a)(4)) is that a medical officer may qualify for the receipt of VIP if he

> is not serving an initial active duty obligation of four years or less or is not serving the first four years of an initial active duty obligation of more than four years.

The VIP statute does not define an "initial active duty obligation." The Department of Defense, however, pursuant to explicit statutory authority to issue regulations implementing the VIP statute (37 U.S.C. 313(a)), promulgated, and the President approved, a directive (Department of Defense Directive 1340.11 (II C)) that defines "initial active duty obligation" as

> [t]he first obligation to serve on active duty for a specified period of time imposed on medical officers by a statute other than section 313 of title 37, U.S. Code * * * by contract or agreement, or by a regulation issued by the Secretary of Defense or the Secretary of a Military Department.

Here, petitioners first were obligated to serve on active duty by their participation in the Armed Forces Health Professions Scholarship Program. The AFHPSP statute clearly states, however, that a "period of time spent in military intern or residency training shall not be creditable in satisfying an active duty obligation imposed by this section." 10 U.S.C. 2123(b). Thus, petitioners did not begin serving their initial active duty obligation until after completion of their internship and residency, *i.e.*, until completion of the period for which they now claim entitlement to VIP. Yet the VIP statute itself precludes from entitlement medical officers serving ini-

tial active duty obligations. This Court, therefore, need look no further than the plain language of the statutes and the unchallenged (Pet. 10) Department of Defense Directive defining initial active duty obligation to determine that the denial of VIP to petitioners was proper.[2]

b. The plain language of the VIP statute is buttressed by the Department of Defense's interpretation of the statute in its Directive 1340.11 (III D), which provides that

> [e]xcept for those programs in which participation in intern or residency training is specifically prohibited by statute or regulation from being creditable toward satisfying an initial active duty obligation, a period of time spent in intern or initial residency training while on active duty may be creditable in satisfying an initial active duty obligation.

The Secretary of Defense is the official to whom Congress has delegated responsibility for implementing the VIP statute, including the express authority, with presidential approval, to issue implementing reg-

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[2] Petitioner's reliance (Pet. 11) on 37 U.S.C. 313(d) is misplaced. That subsection provides:

> This section does not alter or modify any other service obligation of an officer. Completion of the agreed period of active duty, or other termination of an agreement, under this section does not entitle an officer to be separated from the service, if he has any other service obligation.

Thus, Section 313(d) merely makes clear that the fulfillment of obligations incurred pursuant to an agreement entered into under Section 313 has no effect upon a medical officer's other service obligations.

ulations. 37 U.S.C. 313(a). As this Court has noted, the courts must show "great deference to the interpretation given the statute by the officers or agency charged with its administration." *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). Here, the Department of Defense's reading of the AFHPSP's exclusion of intern or residency training is an eminently reasonable interpretation of the governing law.

c. Even if the Court were to go beyond the plain language of the statutes in question, examination of the relevant legislative history confirms that the denial of VIP to petitioners was proper. As originally proposed and passed by the Senate, the VIP statute would have applied to all medical officers whom the Department of Defense determined to be "qualified." S. Rep. No. 93-658, 93d Cong., 1st Sess. 14, 15 (1973). When the Department of Defense informed the House Committee that this would include those persons serving an initial active duty obligation and those undergoing intern or residency training, the Committee amended the statute specifically to make those persons ineligible. H.R. Rep. No. 93-883, 93d Cong., 2d Sess. 6 (1974).[3]

Petitioners mistakenly rely (Pet. 12) on the fact that, in the conference on the VIP legislation, the conferees agreed that medical officers would not be excluded from eligibility for bonus pay for the entire

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[3] The House Report observed (at 6):

> The Committee has amended the bill to exclude from the bonus authority those who are serving in an initial active duty obligation and those who are undergoing intern or residency training in the armed forces. The Department of Defense had indicated that this was its intention and the Committee believed it advisable to put such exclusions in law.

period of their initial active duty obligation, but rather only for the first four years of that obligation, in order to avoid possible inequities or adverse effects that might arise as a result of the variance of the length of active duty obligation from one procurement program to another. The Conference Committee expressed this concern as follows (H.R. Conf. Rep. No. 93-984, 93d Cong., 2d Sess. 7 (1974)):

> Under the various procurement programs where a physician's education is sponsored by the service, physicians take on obligation[s] in some cases as long as nine years. The Uniformed Services University of Health Sciences will require of its graduates a seven-year obligation. In some cases the obligated service varies by a number of years from service to service for the same period of training.
>
> The conferees recognize that a student who gets medical training at government expense is getting some of the most expensive and most marketable training available and should be required to undertake a reasonable payback in service without a bonus. However, to avoid inequities or avoid adverse retention impact, the conferees agreed to language in the conference report which provides that the exclusion from new bonuses for those in initial obligated active-duty shall apply only for up to the first four years of such active-duty obligation.

The foregoing excerpt from the conference report fully supports respondents' application of the VIP statute. Petitioners apparently argue that merely four years of *active duty* qualified them for VIP, but Congress quite clearly required four years of active duty *obligation* or *payback* arising from a subsidized

medical education program. Moreover, the Conference Committee indicated that it contemplated that a medical officer "should be required to undertake a reasonable payback in service without a bonus" as payment for the exceedingly valuable and marketable subsidized training that he had received. This is precisely what petitioners seek to avoid since, in return for serving their obligated service under the AFHPSP, petitioners are seeking a VIP bonus in addition to a subsidized medical education.

Petitioners also rely (Pet. 6-7) on post-enactment legislative hearings in support of their claim (Pet. 7) that "once a medical officer is commissioned, he will be denied the bonus only for the first four years of his active duty obligation, whether all or part of the period is spent in internship and/or initial residency training." An examination of those hearings reveals, however, that the subcommittee members were only referring to medical officers whose active duty obligations, in contrast to those imposed by the AFHPSP, could be satisfied by internship and residency:

> Mr. Ford. So at the point where he finishes his residency he would have normally finished his 4-year obligation?
>
> General Taylor. Yes, sir.
>
> * * * * *
>
> Mr. Ford. So I think the law is very clear, that at that point he has finished 4 years of obligatory service, he has another *x* number of years to go, that he can get a bonus * * *.

Investigation into the Failure of the Department of Defense to Properly Implement Doctor-Bonus Law: Hearings Before Subcomm. No. 4 of the House Comm. on Armed Services, 93d Cong., 2d Sess. 416 (1974)).

Finally, the legislative history of Pub. L. No. 96-107, which, as mentioned above, substantially amended the VIP statute, makes clear that prior to that amendment AFHPSP participants were not entitled to VIP upon completion of their internships and residencies (H.R. Rep. No. 96-166, 96th Cong., 2d Sess. 138-139 (1979)):

> Under current law, a pay disparity exists between physicians who entered military service through the Health Professions Scholarship Program and those who received financial support from other military medical programs (such as the Senior Medical Program (SMP), and personnel who attended medical school in an active duty status). SMP graduates are currently eligible for an annual bonus of $9000 (in addition to other pays and allowances) following completion of their residency training while they are satisfying their active duty obligation. This contrasts with HPSP graduates who are barred by law from receiving that bonus *during the same period.*

2. Petitioners also contend (Pet. 12-13) that, if they are not entitled to VIP under 37 U.S.C. 313, the statute violates the Due Process Clause of the Fifth Amendment. Specifically, petitioners argue that bebecause medical officers who entered the military through other procurement programs may receive VIP credit for time spent in intern or residency training, the statutory scheme creates an arbitrary and irrational classification that discriminates against AFHPSP participants. This claim is also without merit.

The test applicable to a claim such as this was recently reiterated in *Cleland* v. *National College of*

Business, 435 U.S. 213, 221 (1978), quoting *Mathews* v. *De Castro*, 429 U.S. 181, 185 (1976):

> "The basic principle that must govern an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits is well established. Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.' . . . In enacting legislation of this kind a government does not deny equal protection 'merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."' *Dandridge* v. *Williams*, 397 U.S. 471, 485."

The only two subsidized medical education programs offered by the military that currently accept participants are the AFHPSP and the Uniformed Services University of the Health Sciences, created by 10 U.S.C. 2112 *et seq.* In neither of these programs is internship or residency creditable as fulfilling an active duty obligation.[4] Thus, participants in these two programs are not eligible for VIP upon completion of internship and residency training.[5]

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[4] 10 U.S.C. 2114(c) provides that "[a] period of time spent in military intern or residency training shall not be creditable in satisfying and [*sic*] active duty obligation imposed by this section."

[5] Participants in the Uniformed Services University of the Health Sciences are required to serve an active duty obliga-

Hence, the AFHPSP does not create an irrational classification.

To be sure, medical officers who entered the military through other, now discontinued, procurement programs may become eligible for VIP at different times than would an AFHPSP participant. Such variances, however, are not the product of arbitrary discrimination, but rather result ultimately from reasoned distinctions among the programs regarding whether internship and residency training are creditable against the active service duty requirements of the respective programs. For example, a participant in the Senior Medical Student Program (SMSP), referred to by petitioners (Pet. 3, 12), is eligible for VIP upon completion of a three-year residency, because the SMSP imposes only a three-year active duty obligation, which can be satisfied during residency. This less burdensome payback requirement is reasonable in light of the fact that the SMSP participant has not received subsidized medical school tuition and fees, but rather only the pay equivalent to that of an officer during his senior year of medical school.[6]

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tion of not less than seven years. 10 U.S.C. 2114(b). In light of the four-year limitation on ineligibility for VIP due to an initial active duty obligation (37 U.S.C. 313(a)(4)), participants in this program generally would begin to collect VIP four years after completion of a residency.

[6] The Senior Medical Student Program is implemented by Army Regulation (AR) 601-130, under which a participant serves on active duty as a Medical Service Corps Officer during his senior year of medical school and receives full pay and allowances as a military officer. Participation is accompanied by an obligation to "serve on active duty as Medical Corps Officers for a period of three years following completion of intern training." AR 601-130 para. 108(2).

Given the rationality of such distinctions, the rationality of the distinction drawn by the VIP statute follows. Since the active duty obligation of an SMSP participant would be fulfilled at the end of a three-year residency, eligibility for VIP at that juncture is logical in order to induce an additional service commitment. No such need for eligibility for VIP arises at the end of a three-year residency undertaken by an AFHPSP participant because, at that point, his entire active duty obligation lies ahead. Denial of VIP under such circumstances thus fulfills the purpose of the VIP statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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